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Supreme Court of the United States

OCTOBER TERM, 1949

No. 206.

RADCLIFFE MORRIS URQUHART and GEORGE G. URQUHART,
Petitioners,
v.
PYRENE MANUFACTURING COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The findings of fact and opinion of the United States District Court for the Eastern District of Pennsylvania (R. 396a-407a) are reported in 69 F. Supp. 555 and 71 U. S. P. Q. 55. The opinion of the Court of Appeals for the Third Circuit (R. 795-801) is reported in F. 2d and 81 U. S. P. Q. 455. An earlier opinion of that Court (R. 754-7), which was withdrawn (R. 794-5) after reargument of the case, was reported in 77 U. S. P. Q. 492. The fact that this opinion was withdrawn is noted in the index of 168 F. 2d 310. The citations given for the reports of these decisions in Petitioners' brief in support of the petition (p. 29) seem to be confused.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under Section 1254 of the Judicial Code (28 USCA section 1254). The judgment of the Court of Appeals for the Third Circuit

which petitioners seek to have reviewed was entered May 31, 1949 (R. 802), and Petitioners' petition (R. 803) to that Court to clarify its decision was denied June 18, 1949 (R. 806).

Questions Presented

1. *As to the holding of invalidity:*

Is there any important point of law or conflict involved, and, if not, should this Court review the evidence in this case to verify the correctness of the concurrent finding of the District Court and Court of Appeals that the evidence shows Petitioners' patent claims in suit lack invention over the prior art, and involve no more than ordinary engineering skill? (See Petition pp. 25-6, Points 1-3.)

2. *As to the misuse defense:*

The District Court having dismissed Petitioners' counterclaim because of the invalidity of the patents in suit, and also having sustained a defense to the counterclaim based on Petitioners' misuse of said invalidated patents in their licensing system, and the Court of Appeals having affirmed the District Court but declined to discuss the patent misuse defense, should this Court review that question in order to give Petitioners and persons not parties to this suit an advisory opinion with respect to that defense? (See Petition p. 27, Points 4-6.)

Statement

The complaint (R. 4a) brought by Respondent asked for a declaratory judgment as to the validity and its alleged infringement of two Urquhart patents,—2,106,043 issued January 18, 1938 (R. 414a), and 2,198,585 issued April 23, 1940 (R. 419a), on the same original application, filed October 18, 1932. These patents relate to a jet pump process and apparatus for making mechanical foam for fire extinguishing. The Urquharts answered (R. 11a) and coun-

terclaimed for infringement (R. 15a). The reply (R. 18a) reiterated the defenses of invalidity and noninfringement, and, as an additional defense, averred that the counterclaim was also barred by the Urquharts' misuse of the patents in the licensing system they had employed.

The case was tried (R. 25a-395a) in open Court in Philadelphia before Judge Kirkpatrick, who saw and heard the witnesses. After full consideration of the evidence and the briefs and answering briefs of both parties, that Court rendered an opinion (R. 396a-407a), in which it embodied its special findings of fact and conclusions of law (R. 407a). As the opinion shows, its holdings of invalidity of the process and apparatus claims in suit and of noninfringement of the latter, were based upon factual findings and involved no new or substantial question of law; and its sustaining of the misuse defense also turned on factual findings, which brought the issue within well settled law.

From the District Court's judgment (R. 407a), the Urquharts appealed to the Court of Appeals for the Third Circuit. On May 18, 1949, after consideration of the briefs and arguments on appeal, that Court filed an opinion (R. 754-7), affirming the District Court's judgment. The Urquharts petitioned for rehearing, alleging that the Court's opinion of May 18, 1949 involved misunderstandings of the factual evidence (R. 769). The Court allowed the petition, and ordered an oral reargument of the entire case (R. 793-4), at which it also received a new brief from the Urquharts covering their views of the entire case, and a short reply brief from Pyrene.

On May 31, 1949, the Court of Appeals for the Third Circuit, after full consideration of the issues raised at the reargument, withdrew its opinion of May 18, 1949 (R. 794-5), and filed a longer opinion as to invalidity (R. 795-801) and a judgment (R. 802), which also affirmed the judgment below.

The Urquharts then filed a petition (R. 803) to the Court of Appeals to limit or clarify its decision of May 31, 1949 with respect to the misuse defense. On June 18, 1949, after

due consideration, the Appellate Court denied this petition (R. 806).

The present petition asks this Court to review the Court of Appeals' decision of May 31, 1949, rendered after argument and reargument of the case.

Comparing the Court of Appeals' decision (R. 795-801) with that of the District Court (R. 396a-407a), it will be seen that both Courts hold the claims in suit invalid for lack of invention on the same factual grounds, and that the decision on appeal does not express or imply disagreement with the District Court.

ARGUMENT

I. As to the petition to review the Court's holding of invalidity of the patent claims in suit:

The petition in substance requests the Court to review factual findings on which both Courts below concurred. There is involved no conflict between the Third Circuit Court's decision and that of any other Circuit Court of Appeals, and no important question of law, nor any of the other circumstances referred to in this Court's Rule 38, subdivision 5(a), (b) or (c), as usual grounds for granting petitions.

The petition (pp. 25-7), under the heading "Reasons for Allowance of the Writ" lists three points having to do with the holding of invalidity. We will now briefly comment on these points.

As to Point 1:

The petition quotes two sentences, isolated from the text, at pages 5 (R. 799, last sentence of middle paragraph) and 6 (R. 800, last sentence of first paragraph) of the Court of Appeals' opinion, reading respectively:

> "Improvement will not sustain invention and at most the insertion of a baffle or spiral in a nozzle can

> constitute nothing more than mechanical ingenuity" and "But we state again that improvement of a disclosed process cannot constitute invention".

The petition and brief attempt to twist the Court's meaning into a holding of law that an improvement can *never* amount to invention. It is obvious from the opinion that the Court made no such holding of law.

The text of the opinion from which the sentences are excerpted makes it plain that what the Court meant by each of these sentences was that such improvement, if any, in foam or throw, as Urquharts may have made over the prior Wagner process by putting a spiral or baffle in the motive nozzle of the jet pump to increase turbulence and subdivision of the liquid, was at most a matter of mechanical ingenuity within ordinary engineering skill, and that such improvement does not amount to invention. The fact that improvement in the nature of mechanical ingenuity or otherwise within the skill of the art does not amount to invention is, of course, elementary patent law.

Plainly there is no merit in Petitioners' Point 1, that the Third Circuit Court of Appeals made a holding of law that improvement can never amount to invention.

As to Point 2:

Here the petition attempts to create an illusion of conflict between the decision of the Court of Appeals in this case and an unreported and unappealed decision (R. 497a-500a) of the United States District Court for the District of Columbia. There is no such conflict.

Patent 2,106,043 in suit was not involved in the District of Columbia case. It issued on a divisional application, two years before the Columbia case was decided.

The District of Columbia case was an *ex parte* suit brought by the Urquharts under R. S. Section 4915 (35 U. S. C. A. Section 63) to obtain allowance of claim 28 of their application (now claim 1 of Patent 2,198,585), the only claim involved in that case. This claim is identical

with claim 12 of Patent 2,106,043,—except that it substitutes the phrase "aspirating air from the atmosphere" for the phrase "entraining gas" used in claim 12.

The issue in the District of Columbia case was whether or not the drawings and description of the Urquharts' original application disclosed a process that involved "aspirating air from the atmosphere". The Patent Office had allowed all the other claims of both patents, but had rejected claim 28 because it considered that the Urquhart description was confined to a process in which the gas inlet pipe (see pipe 14 of Figure 1) was connected to some source of gas or air under a pressure above atmospheric pressure, and did not disclose a process leaving the inlet open for "aspirating air from the atmosphere". (See the file history Physical Exhibit P-3-B.) In so deciding the Patent Office stressed the sentences of the patent description (p. 1, lines 42-50), as follows:

> "The entering gas is distributed in the chamber 11 under pressure which may be from 15 to 30 pounds per square inch, or any desired pressure, depending upon the throw which is desired from the foam nozzle. It is possible to introduce the gas at relatively low pressures (not lower than the nozzle outlet pressure) but better results are obtained by forcing the gas in at higher pressures."

According to the Patent Office view, these sentences recommend that the air or gas be delivered to the inlet at a pressure of 15 to 30 pounds per square inch above atmospheric pressure, and in any event at a pressure "not lower than the nozzle outlet pressure", which the Patent Office held to be above atmospheric pressure.

In the District of Columbia case the Urquharts persuaded that Court that their description included leaving the gas inlet open to the atmosphere; that the 15 to 30 pounds pressure recommended was on "the absolute scale", and meant atmospheric pressure to about 15 pounds above it; and that "nozzle outlet pressure" meant merely whatever the pressure of the surrounding atmosphere might be.

These were the issues decided by the District of Columbia Court (R. 497a-500a).

No such issues were involved in the present suit, where the Courts assumed that the District of Columbia Court was right in deciding that the patents describe a process involving "aspirating air from the atmosphere", but held the process claims of both patents in suit invalid on other grounds.

The brief in support of the present petition mistakenly assumes that the District of Columbia Court decided something about the action of the spiral in the motive nozzle of the jet pump and its effect on turbulence and subdivision, which conflicts with the Court of Appeals' views in the present case. But no such subject matter was involved in the District of Columbia case. Claim 1 of Patent 2,198,585 there in issue was identical with allowed claim 12 of Patent 2,106,043 insofar as it refers to turbulence and subdivision, and there was no issue with the Patent Office about that part of the claim in the District of Columbia case.

Plainly there is no conflict, and no merit in Point 2.

As to Point 3:

Here the Petitioners ask this Court to review the concurrent findings of the Court of Appeals and District Court to the effect that the process claims in suit lack invention over the prior Wagner patents, and that the apparatus claims lack invention over the prior Wagner and Burmeister patents; and also the Court of Appeals' further finding that the apparatus claims are also void for functionality; and the District Court's further findings that the apparatus claims are void for aggregation and not infringed. The petition alleges that the findings depart from the evidence so far as to call for exercise of this Court's power of supervision.

The findings are fully supported by the evidence, and Petitioners have had full opportunity to present their contrary views not only to the District Court, which saw and

heard the witnesses, but also to the Court of Appeals both on argument and on reargument.

(1) *As to the process claims:*

Both Courts found (Court of Appeals R. 796-799; District Court R. 397a-8a) that the idea of making mechanical fire extinguishing foam substantially as described and claimed in the patents in suit did not originate with Petitioners, but was disclosed in each of the prior Wagner patents (British, issued in 1927, R. 630a; U. S., issued in 1931, R. 628a; and German, issued in 1931, R. 633a). They found that Wagner, like the Urquharts, described a process of making fire extinguishing foam by forcing a stream of water containing a foam stabilizer (such as saponin) through a water jet air pump, to suck in and intimately mix with the liquid enough air to form and discharge a stream of foam at a fire. This finding is fully supported by the text of the Wagner patents, and the testimony about their disclosures (R. 255a-262a).

Petitioners did not deny the priority of Wagner's patents, but contended that the Wagner disclosures were inoperative because Wagner did not describe the inside of the motive nozzle of his water jet air pump, or state specifically that a motive nozzle should be used which subdivides the jet of liquid forced through it. Petitioners attacked Wagner's motive nozzle disclosure, because that was the only respect in which the Urquhart patents gave any more information than Wagner about how to engineer a jet pump for the job. They contended (R. 55a) that the Urquhart patents (R. 414a, 419a) described a patentable improvement over Wagner which made the process operative, by suggesting (Urquhart patents p. 1, column 2, lines 20-26 and 37-42) that it is "desirable" to have in the motive nozzle 12 of their water jet air pump "a spiral 13 or other suitable baffle means which will cause turbulent flow of the mixture and insure good contact with the gas"; that the action taking place in the motive nozzle 12 "may be described as mechanical subdivision of the foam forming

mixture"; and that "this action is not absolutely necessary for the present invention but is advantageous." Petitioners argued that their alleged invention over Wagner was embodied in process claims 12 and 1 in suit by specifying that the jet of liquid was discharged from the nozzle "in such manner as to impart a high degree of turbulence to the body of the stream, thereby finely subdividing the same."

Both Courts found that Wagner's disclosure was operative, and that any improvement resulting from the Urquharts' suggestion of putting a "spiral or other suitable baffle means in the motive nozzle" "to impart a high degree of turbulence to the body of the stream, thereby finely subdividing the same" was a matter of ordinary unpatentable engineering skill (Court of Appeals, 769-800; District Court, 398a-402a). These findings are fully supported by the evidence.

The text of the Wagner patents makes it clear that the duty for which his jet pump should be engineered is to aspirate and intimately and mechanically mix with the motive liquid the air needed to fill the foam and to discharge the product at a velocity sufficient to carry it to the fire. (See Wagner British, R. 630a, lines 15-20 and 55-65; Wagner U. S., R. 628a, lines 3-14, 17-19; Wagner German, R. 633a-635a). And Wagner pointed out that jet air pumps suitable for the duties he prescribed were "well known" (Wagner British, R. 630a, lines 54-55; German R. 634a, lines 13-14).

The evidence in this case shows conclusively that such jet pumps and how to engineer them to perform the duties Wagner prescribed had in fact been well known for at least 40 years prior to the date of the Wagner patents.

The testimony of Lindemann, chief engineer of Schutte and Koerting, the largest jet pump manufacturer (R. 231a-254a and 690a-711a) describes how water jet pumps had always been engineered for pumping air. One requirement was that the motive nozzle should subdivide the jet enough so that, in passing across the air suction space of the jet pump, it would contact and drive into the discharge pipe

of the jet pump the desired proportion of air. A second requirement was that the discharge pipe must be positioned and proportioned with respect to the jet so that an intimate mixture of air and water would just fill the discharge pipe to prevent the air from leaking back into the suction space. A third requirement was that the mixture of air and water must be discharged at sufficient velocity to prevent the air from leaking back into the suction space. With these requirements in mind, Schutte and Koerting made and sold a large variety of water jet air and gas pumps and engineered them to suit any job for which a customer wanted one. Schutte and Koerting also made and sold a large variety of jet pumps engineered for pumping liquids or solids. These pumps did not have to meet the above mentioned air pump requirements, and like any other kind of pumps designed for pumping liquids or solids were usually ineffective for pumping air.

With regard to the Urquharts' alleged improvement of putting a spiral or other baffle means in the motive nozzle to cause turbulence of the liquid and thereby subdivide the same, Petitioners admitted at the trial (R. 263a-4a) that it was a very old expedient known to increase the efficiency of water jet air pumps for aspirating and intimately mixing air with the motive liquid. It is described for example in the Koerting patent of 1883 (R. 639a, p. 62, lines 51-66 and 89-99); Koerting patent of 1909 (R. 643a); Symons patent of 1912 (R. 646a); and Schutte and Koerting catalogue (R. 653a). Lindemann testified (R. 241a-2a, 710a) that Schutte and Koerting always used a spiral in the motive nozzle of all kinds of water jet air pumps which they made and sold (except small laboratory jet air pumps for which efficiency was not important, and jet air pumps designed to operate at water pressures too low to work well with a spiral).

The testimony of McNulty (R. 264a-279a) shows that it is not necessary to use a spiral or other special jet subdividing means in order to make fire extinguishing foam by the Wagner process. It shows that with or without a

spiral the pump must be properly engineered in the usual way to pump air vigorously by proportioning and positioning the discharge pipe suitably with respect to the jet; but that any ordinary sort of hole through the motive nozzle, straight or tapered, will spray out the jet enough to aspirate and intimately mix the proportion of air needed to make a fire extinguishing foam by the Wagner process.

Petitioners also argued that they must have made some invention over Wagner because the Wagner process was not immediately put into commercial use. Both Courts found no merit in this argument. They found that the need for a cheaper stabilizer was responsible for this delay, and the District Court also referred to the difficulty of convincing the public that an air filled foam would be competitively as good as non-combustible gas filled chemical foam for putting out a fire (Court of Appeals, R. 800; District Court, R. 403a). The evidence fully supports these findings.

Urquhart admitted that these were the reasons why Petitioners did not succeed in interesting anyone in using their process commercially until about 1938. As to the need for a cheaper stabilizer, he testified (R. 54a) that the cost of making air foam by the Urquhart process with saponin stabilizer was about the same as the cost of making chemical foam by the old chemical foam process then in general use; and that the very high cost of saponin mitigated against the use of their process (R. 53a-4a); and that after trying unsuccessfully in 1932 by numerous demonstrations and tests (R. 52a-4a) to interest the Mack Truck Company and the Standard Oil Company in commercializing the Urquhart process, the Urquharts worked for several years on developing a cheaper stabilizer than saponin, before again attempting to interest anyone in the commercialization of their process.

Urquhart's testimony also shows the difficulty of persuading the public before the advent of cheaper stabilizers that air foam made by the Wagner and Urquhart process would be competitively as good as the non-combustible gas filled foam made by the old chemical foam process then in

general use. The Standard Oil Company and the Mack Truck Company, to whom the Urquharts demonstrated their process in 1932-1934, were not interested in its possibilities for making air foam, but only in its possibilities for making a non-combustible gas filled foam mechanically as shown in Figures 3 and 4 of the patents in suit (R. 52a-3a). Also the Urquhart patents in suit state (R. 414a, 419a, p. 1, column 2, lines 34-5): "It is obviously better, however, to use a non-combustible gas". But, for making non-combustible gas filled foam, the Urquhart process proved to be commercially impractical, and still is up to the present time (R. 136a-7a). Whenever non-combustible gas filled foam is wanted, the old chemical foam process was and still is better for making it.

In view of this strong public preference for non-combustible gas filled foam, it was impractical to commercialize the Urquhart or Wagner process for making air foam, so long as non-combustible gas filled chemical foam could be made as cheaply by the old process. Hence the necessity of finding cheaper stabilizers before the air foam process could be commercialized.

Durfee testified (R. 103a-4a) that these were also the reasons why Pyrene was not interested in trying to commercialize the Wagner process until it had found cheaper air foam stabilizers. In 1934 Pyrene heard that cheaper stabilizers had been developed abroad. In 1935 Pyrene developed its own air foam equipment and cheaper stabilizers and put them on the market in this country in 1936 (R. 104a-109a).

The Urquharts also argued that air foam is so superior to chemical foam for use on ships that the U. S. Navy would have used air foam before a cheaper stabilizer became available. But the record shows that although Pyrene in 1936 to 1940 sold air foam to the U. S. Army Air Forces (R. 475a), and to the British Navy (R. 134a), the U. S. Navy would have none of it, and used chemical foam exclusively until 1941, when it substantially copied the air foam devices and stabilizers which Pyrene had previously

supplied to the British Navy (R. 134a). Until cheaper air foam stabilizers came along, no customer wanted air foam.

(2) *As to the apparatus claims:*

Petitioners' patents contain no apparatus claims for their water jet air pump, because that was old apparatus. Instead, the apparatus claims seek to cover as a patentable combination a jet pump, engineered for drawing in and mixing a stabilizer with the water stream, connected in series to a water jet air pump for making mechanical foam. Both Courts found (Court of Appeals R. 800-801, District Court R. 404a) that in view of the Wagner patents the apparatus claims lacked invention over the Burmeister British patent 251,950 issued in 1927 (R. 662a), and this finding is fully supported by the evidence.

The Burmeister patent describes the same jet pump equipment as the Urquhart patents for making a premix of the water and stabilizer (R. 663a, lines 100-109), and shows it connected in series to a second jet pump for drawing in gas producing chemicals to convert the premix of water and stabilizer into chemical foam. The Urquhart apparatus claims attempt to monopolize this old Burmeister premixing equipment, whenever it is connected in series to a water jet air pump for making mechanical foam. Urquhart admitted that there was no sort of functional cooperation in their series arrangement of the two jet pumps. He testified (R. 58a-59a) that the water jet air pump functions in exactly the same way, regardless of how the premix of water and stabilizer is supplied to it. And the Burmeister water and stabilizer premixing equipment also functions in the same way to supply the water and stabilizer premix, regardless of what it is connected to. Plainly, as the Courts found, no invention is involved in connecting Burmeister's old water and stabilizer mixing equipment in series with another foam making device for which a supply of water containing stabilizer is wanted.

The District Court also condemned the Urquhart apparatus claims as an unpatentable aggregation, pointing out

that it would be as reasonable to claim a patentable combination with the hydrant which supplied the water (R. 404a).

The Court of Appeals further condemned the claims as too vague and functional on the face of the patent. The Urquhart patents only disclosed for supplying the water and stabilizer mixture a mechanical pump (illustrated diagrammatically by a square and nowhere described) and the old Burmeister jet pump arrangement. The apparatus claims do not attempt to cover the mechanical pump illustrated by the square, but instead of being limited to their jet pump arrangement—the only other thing described—they are vaguely and functionally worded in an attempt to cover any kind of apparatus whereby the energy of the water stream is used to draw in a stabilizer; and were asserted by the Urquharts to cover Pyrene's differential pressure devices which are totally different from jet pumps and which the Urquhart patents do not describe. The Court of Appeals was right in this holding also.

II. As to the Petition to review the misuse defense:

1. Points 4 and 5 of the petition and supporting brief (petition p. 27, supporting brief pp. 41, 42) allege that the Urquharts and certain concerns not parties to this suit are embarrassed by the District Court's opinion sustaining this defense, because they are interested in the licensing system or in allegedly similar licensing systems under chemical foam patents. Therefore Petitioners argue that this Court should review the facts and applicable law in this case, and give or order the Court of Appeals to give an advisory opinion as to the licensing system for the benefit of the Urquharts and the persons not parties to this suit.

The Urquharts' licensing system comprises an agreement (R. 715a-9a) with National Foam Systems, a manufacturer of apparatus and stabilizers which it sells for use by the purchaser in the process claimed in the patents in suit.

The agreement defines "Foam Producers" and "Foam Stabilizers" as any apparatus or substances for use in the patented process. It requires the manufacturer to pay a royalty of 15% of the selling price to the Urquharts on all such supplies sold for use in the patented process, and licenses the purchasers to use in the process of the patents in suit the purchased "Foam Producers"—but only with purchased "Foam Stabilizers" on which the royalty has also been paid by the same or a similarly licensed manufacturer. The manufacturer marked all cans of "Foam Stabilizer" sold with a notice (R. 720a) warning the purchaser of the patents in suit and of these limitations upon the purchaser's right to practice the process claimed in the patents. A similar notice (R. 721a-2a) also accompanied any "Foam Producers" sold by the manufacturer.

The Urquharts testified (R. 731a-3a) that they had granted like licenses to two other manufacturers of such supplies, and were willing to license any other responsible manufacturers of such supplies on the same terms. The Urquharts also testified (R. 735a-6a) that they had not licensed any users of the patented process to practice it on terms permitting the user to buy his apparatus or stabilizer from sources other than the manufacturers who had the aforesaid agreements with the Urquharts; and that if any user applied for such a license they would demand a higher license fee than the aforesaid agreements required the manufacturers to pay (R. 736a, 737a, 740a, 753a).

The District Court's findings (R. 404a-7a) are fully supported by the foregoing evidence. The law it applied and which is applicable to such facts has been well settled by this Court, for example in *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458; *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488; *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661; and *Mercoid Corp.* v. *Honeywell Co.*, 320 U. S. 680, 684. It has also been applied by the Court of Appeals for the Third Circuit in *Barber Asphalt Corp.* v. *La Fera Grecco Contr. Co.*, 116 F. 2d 211, and *National Lockwasher Co.* v. *George K. Garrett*

Co., 137 F. 2d 255; and by the Court of Appeals for the Second Circuit in *Philad Co.* v. *Lechler Laboratories*, 107 F. 2d 747. No new question of law is involved.

Point 6 of the petition alleges that this Court's decisions in the freight basing point cases cited in Point 6 justify Petitioners' aforesaid use of its patents to maintain a partial monopoly in the sale of unpatented supplies for use in the patented process. These decisions obviously have no application to the facts of the patent misuse defense.

Conclusion

The petition is without merit.

Respectfully submitted,

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